STATE OF MICHIGAN

COURT OF APPEALS

EIGHT MILE AND HAGGERTY LAND COMPANY,

Petitioner-Appellant,

v

CITY OF NOVI,

Respondent-Appellee.

UNPUBLISHED
April 22, 2014

No. 309275
Michigan Tax Tribunal
LC No. 00-363342

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Petitioner appeals as of right from a Michigan Tax Tribunal judgment that established the true cash values, state equalized values, and taxable values of its real property for the 2009, 2010, and 2011 tax years. We affirm.

Petitioner owns property in Novi, Michigan, that has been occupied for several years by a Big Boy restaurant franchise. The property is located on Haggerty Road, north of Eight Mile Road, along the I-275 expressway. The property is within respondent's Freeway Service District and is subject to a highway easement held by the Michigan Department of Transportation (MDOT). Petitioner contended that the highest and best use for the property was its current use as a sit-down restaurant, but that the value of the property for such use was diminished by the abundance of other restaurants in the area. Petitioner contended that the MDOT easement and the property's location in the Freeway Service District limited its potential for development for other uses, thereby negatively affecting its value. Petitioner asserted that the property had true cash values of $740,000 for 2009, $560,000 for 2010, and $515,000 for 2011.

Respondent maintained that the MDOT easement did not adversely affect the property's value, and that the property could feasibly be developed for a variety of commercial uses, including as a restaurant or a financial institution, under the existing zoning classification. Respondent argued that the highest and best use of the property was as vacant land ready for redevelopment. Respondent asserted that the property had true cash values of $1,120,000 for 2009, $1,070,000 for 2010, and $1,020,000 for 2011. The tribunal agreed with respondent's valuations.

On appeal, petitioner first argues that the tribunal erred in its evaluation of the effect of MDOT's highway easement on the value of petitioner's property. We disagree. The standard by

which this Court reviews a decision of the Michigan Tax Tribunal is summarized in *Briggs Tax Serv, LLC v Detroit Pub Schools*, 485 Mich 69, 75; 780 NW2d 753 (2010), as follows:

> The standard of review of Tax Tribunal cases in multifaceted. If fraud is not claimed, this Court reviews the Tax Tribunal's decision for misapplication of the law or adoption of a wrong principle. We deem the Tax Tribunal's factual findings conclusive if they are supported by competent, material, and substantial evidence on the whole record. But when statutory interpretation is involved, this Court reviews the Tax Tribunal's decision de novo. [Quotation marks omitted.]

"Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. Failure to base a decision on competent, material, and substantial evidence constitutes an error of law requiring reversal." *Meijer, Inc v Midland*, 240 Mich App 1, 5; 610 NW2d 242 (2000) (citation omitted).

Petitioner maintained that although its lot was approximately 50,000 square feet in size, it should have been treated as being closer to 40,000 square feet for valuation purposes because approximately 10,000 square feet were burdened by MDOT's highway easement. The parties' experts generally agreed that the area subject to the easement could not be built upon, but testimony indicated that the easement area could be used for other purposes, such as parking (as petitioner had been doing for many years), landscaping, or to meet zoning setback requirements. The witnesses disagreed on whether the easement affected the marketability or future use of the property.

Contrary to what petitioner argues, the tribunal did not fail to consider the impact of the easement on the property's value. The extent to which an easement affects the value of property is a question of fact. The tribunal did not commit an error of law or misapply a legal principle because it recognized its obligation to determine whether the easement affected the fair market value of the property. The tribunal noted that conflicting testimony was presented with regard to whether the easement actually affected the value of the property and it ultimately resolved this factual issue by finding that the easement did not have a substantive negative impact on the true cash value of the property. The tribunal's decision is supported by evidence that petitioner had used the property to operate a restaurant for many years (since 1984) without any adverse impact from the easement, which had been in place since 1973. Petitioner had been able to use the area covered by the easement to supplement its parking lot. Testimony also indicated that the easement area could be used for landscaping and to satisfy zoning setback requirements. Thus, we find that the tribunal's finding that the easement did not adversely impact the value of the property is supported by competent, material, and substantial evidence on the whole record.

Petitioner next argues that the tribunal failed to give adequate consideration to the property's zoning classification, which limited the available commercial uses of the property. We disagree. The parties disagreed whether the existing zoning classification for the property permitted its use as a financial institution. Respondent's appraiser expressly testified that the existing zoning classification permitted the property to be used as a bank. The tribunal found that a bank was a permissible use under the existing zoning classification.

Petitioner relies on portions of the city's zoning code related to uses that are permitted in an Office Service District to argue that because the zoning code expressly permits financial institutions in another zoning classification, a bank should not be considered a permissible use within the Freeway Service District. Petitioner, however, did not raise or present this issue to the tribunal. Although the tribunal did state in its decision that it had "reviewed the ordinance and finds no specific prohibition against use of the property as proposed by Respondent's appraiser," it is apparent that the tribunal was referring only to the Freeway Service zoning ordinance. Again, the tribunal was never asked to determine whether development of a financial institution in a Freeway Service District was prohibited because banks were specifically permitted in another type of zoning district. Because this issue was not presented to the tribunal, it is waived. See *Wayne Co v Michigan State Tax Comm*, 261 Mich App 174, 198; 682 NW2d 100 (2004).

Petitioner also argues that the tribunal erred in accepting respondent's valuation because it was dependent upon a zoning change. Petitioner relies on *Kensington Hills Dev Co v Milford Twp*, 10 Mich App 368, 372; 159 NW2d 330 (1968), for the rule that a property valuation cannot assume that a zoning change will be obtained. However, petitioner misapprehends the testimony of respondent's appraiser. Respondent's appraiser testified that a bank was a permissible use under the Freeway Service classification. He did not state that a variance from the existing zoning classification was necessary to develop the property for use as a bank. Further, the tribunal did not find that a variance was necessary to develop the property for use as a financial institution. Thus, the tribunal did not violate the rule in *Kensington Hills Dev Co*.

The tribunal observed that even petitioner's appraiser agreed in his report that the existing zoning classification for the property permitted a broad variety of retail and commercial uses, and that he also seemed to contradict himself by attempting to understate the permissible uses for the property. The credibility of the witnesses and the weight of their testimony were matters for the tribunal to decide. *President Inn Props, LLC v Grand Rapids*, 291 Mich App 625, 636; 806 NW2d 342 (2011). Given the indecisive testimony from petitioner's appraiser on this subject, the tribunal did not err in concluding that the zoning restrictions did not restrict the future uses of the property to the extent argued by petitioner. Petitioner has not demonstrated that the tribunal's decision regarding permissible uses of the property was not based on competent, material, and substantial evidence on the whole record.

Petitioner lastly argues that it was prejudiced by the late submission of an exhibit offered to correct errors in respondent's original appraisal report, and that it is entitled to a new valuation hearing on the basis of fraud. We disagree. Initially, we find no merit to petitioner's argument that respondent fraudulently represented that the exhibit was not available until shortly before trial. The record does not support petitioner's assertion that the exhibit was prepared and available on September 7, 2011. It is apparent that the referenced date in the title to the exhibit refers to the date of the original appraisal report, not the date the exhibit was prepared. At trial, respondent's appraiser explained that he did not discover the errors until he reviewed his report in preparation for trial. There is no evidence indicating that respondent had been aware of any amendments or corrections to the original report months before trial.

To the extent that petitioner challenges the tribunal's evidentiary decision to admit the late exhibit, we review the tribunal's rulings regarding evidentiary issues to determine if they involve errors of law. *Georgetown Place Coop v Taylor*, 226 Mich App 33, 50; 572 NW2d 232

(1997). The tribunal's decision to admit the exhibit was intended to ensure that it had the most accurate information. The tribunal noted that the changes and corrections were not difficult to follow as respondent's appraiser explained them in his testimony and that the changes did not change the appraiser's overall conclusion regarding value. Further, petitioner was afforded an opportunity to review the changes with its own appraiser during a break at trial, and the tribunal permitted petitioner to cross-examine the appraiser regarding any changes. Thus, petitioner has not shown any error of law by the tribunal in admitting the exhibit. See *id.* at 51-52 (finding no error in the tribunal's decision to allow the respondents to amend their appraisal at the time of trial where the petitioner was provided an opportunity to cross-examine the appraiser and present arguments in a posthearing brief).

Petitioner complains that respondent's appraiser improperly included sales figures that did not compensate for the economic downturn that occurred in 2008. We find no merit to petitioner's attempt to equate this alleged deficiency with fraud because it is apparent that the tribunal took into account that respondent's appraiser had not adjusted for the 2008 recession when it acknowledged this shortcoming in its decision. Further, petitioner was able to cross-examine respondent's appraiser on this issue.

Petitioner also takes exception with respondent's appraiser's assignment of $50,000 as the cost to demolish the existing building on the property to sell the property as vacant land. Petitioner argues that the tribunal should have accepted the demolition cost of $235,000 offered by its expert because the former was an estimate and the latter was undisputed and properly documented. We disagree. Petitioner's witness estimated that it would cost $235,000 to prepare the site for development, which he believed required correcting soil problems, replacing the retaining wall, changing signs, and making public improvements, like sidewalks, resurfacing parking areas, and landscaping. In contrast, respondent's appraiser testified that he estimated that it would cost approximately $50,000 to demolish the existing building to prepare the property for sale as vacant land. It is apparent that petitioner's cost estimate was not limited to the cost to demolish the existing structure, but rather included many additional improvements associated with the actual development of the property. The tribunal's decision to accept an estimate of $50,000 as the cost to demolish the existing structure, and not make additional improvements, is supported by competent, material, and substantial evidence, and therefore, must be upheld. *Briggs Tax Serv*, 485 Mich at 75.

Affirmed. Respondent, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ /Michael J. Riordan